

**IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS**

LEROY S. ROBINSON, JR.,)	
)	
Appellant,)	
v.)	Vet.App. No. 15-0715
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLEE’S RESPONSE TO THE SEPTEMBER 1, 2016,
ORDER OF THE COURT**

Appellee, Robert A. McDonald, Secretary of Veterans Affairs, submits this response to the Court’s September 1, 2016, Order.

Appellant’s counsel’s August 24, 2016, notice pursuant to *Solze v. Shinseki*, 26 Vet.App. 299 (2013), that “communication from the Secretary’s counsel has been ‘minimal, if any,’” and that “the Secretary’s [August 24, 2016] response to the contrary is ‘simply disingenuous,’” is both inaccurate and misleading. In his August 24, 2016, Response to the July 14, 2016, Order of the Court, the Secretary asserted that “both before and after August 10, 2016, the Office of General Counsel corresponded with Appellant’s counsel by email, answered her questions, and kept her informed of its progress in making Appellant’s source documents available to her,” and Appellant’s counsel’s dismissal of the General Counsel’s actions in this matter not only minimizes (or outright ignores) the emails that the undersigned counsels sent directly to Appellant’s counsel between July 14, 2016, and August 24, 2016 – both before

and after the issuance of the Court's August 10, 2016, Order – she also erroneously suggests, absent any basis for her suggestion in law or in the rules or orders of this Court, that further communication between counsel and Appellant's counsel was required or necessary.

Indeed, on Monday, July 18, 2016, the Secretary's counsel responded to Appellant's counsel's Saturday, July 16, 2016, request to “[k]indly have Robinson’s paper file sent to the VA Regional Office [RO] on Wissahichon(sic) Ave., in Philadelphia, PA,” by updating her through email that the Office of General Counsel was “in the process of having the paper source copies of Mr. Robinson’s documents assembled,” and that it would be back in touch with [her] when [it had] further information.” Further, on July 26, 2016, the Secretary's counsel notified Appellant's counsel that the Secretary had decided to seek a stay with the Court “so that [he] ha[d] time to exercise [his] appellate rights before the United States Court of Appeals for the Federal Circuit,” and asked for her position on the stay. Inexplicably, Appellant's counsel refers to counsel's July 16, 2016, email as “a ‘cryptic’ two sentence response,” and complains that she “heard nothing more from the Secretary” until she was informed that he would be filing for a stay. [Appellant's August 24, 2016, Notice to the Court of Relevant Information (Appellant's August 24, 2016, Notice) at 3]. It remains unclear what further communication Appellant's counsel was expecting, what in the Secretary's emails were “cryptic,” and why she believes any further response from counsel at that time was required. See *id.*

Subsequent to the Court's denial of a stay, and in response to an August 11, 2016, email from Appellant's counsel in which she specified the availability in her schedule to review the paper source documents, the Secretary's counsel informed her that the paper source documents were "being sent overnight to Philadelphia to the attention of Ameen Khabir, [Assistant] Veterans Service Center Manager, and Garrick Younger, [Acting] Veterans Service Center Manager," and that they would be in touch with her regarding her review. In an email the following day Appellant maintained to the Secretary's counsel that a privacy act form was not required for her review and dictated terms for that review; no questions were posed, no response was requested and accordingly, no response was provided. On August 16, 2016, the Secretary's counsel confirmed that the paper source documents for Mr. Robinson had been delivered to the Philadelphia VA RO, along with specified instructions to contact Appellant's counsel to set-up the review.

When, on August 23, 2016, Appellant's counsel notified the Secretary's counsel that she had "received NO contact from the persons . . . mentioned in [counsel's] August 11, 2016, email, counsel responded moments later that same day that "[t]he documents were transferred to [the Philadelphia VA RO]," that he had been told that Appellant's counsel would be contacted, that earlier that morning he had emailed the Philadelphia VA RO for confirmation that contact had occurred, and that he would follow-up with the Philadelphia VA RO again later that day since, apparently, contact had not been made. Again, the

Secretary's counsel identified Mr. Garrick Younger, the Acting Veterans Service Center Manager, as his contact at the Philadelphia VA RO, and included him on the August 23, 2016, email to Appellant's counsel. Later on August 23, 2016, Mr. Younger contacted Appellant's counsel by telephone, and spoke with her briefly, and it was subsequently agreed that she would review Appellant's paper source documents at the Philadelphia VA RO at 11:00 AM on August 30, 2016.

Again, it remains unclear from Appellant's August 24, 2016, response what further communication counsel was required to provide, and how the communications detailed above, taking place between July 10, 2016, and August 24, 2016, were "minimal" or nonexistent. See *Evans v. West*, 12 Vet.App. 22, 31 (1998) (holding that the Court will give no consideration to an "unsupported contention"). In accusing the Secretary's counsel of "'spin[ning]' the facts in a manner which makes it 'appear' that he has 'corresponded by email,' 'answered her questions' and 'kept her informed of its progress in making Appellant's source documents available to her,'" when that is, in fact, exactly what the undersigned counsels did during that time, Appellant's counsel advances only inflammatory rhetoric in a document that is itself "disingenuous." [Appellant's August 24, 2016, Notice at 4] [citing Appellee's August 24, 2016, Response to the Court's Order at 2].

The Secretary concedes that at some point after it was confirmed to the Secretary's counsel on August 16, 2016, that the paper source documents had been received by the RO with instructions from the Secretary's counsel, and after

it was confirmed that an appointment would be made with Appellant's counsel for her review, those paper source documents were erroneously transferred off-site by RO personnel for scanning (which was unnecessary as the materials had already been scanned). Unfortunately, the fact that the materials had been transferred was not discovered by Mr. Younger, or any of the people arranging for Ms. Goffney's review, until she arrived for that purpose on the morning of August 30th. Had the error been discovered in advance, the RO would have called to reschedule the appointment. Instead, Appellant's counsel was regrettably inconvenienced by having to travel to the RO, only to be told that the materials were not there. The Secretary's counsel was informed of the problem by Mr. Younger after Ms. Goffney had left the RO.

As soon as the Secretary's counsel was notified, he coordinated with the Philadelphia VA RO to have the paper source documents returned immediately to the RO. Notably, while Appellant's counsel did file notice with the Court on August 30, 2016, outlining her difficulties, she at no time contacted the Office of General Counsel in general, or the undersigned counsels in particular, to ask questions, express her understandable frustration, or request further information or assistance.

On August 31, 2016, the following day, and on September 2, 2016, Mr. Younger attempted to reach Appellant's counsel by telephone to inform her that the paper source documents had been returned to the Philadelphia VA RO, and that his office was ready and willing to accommodate her review. Although Mr.

Younger left two voicemails for Appellant's counsel, one on each of those days, Appellant's counsel did not respond to Mr. Younger until he also emailed her on September 2, 2016, reiterating the above and requesting that she provide a date and time for her review. In her response to Mr. Younger, Appellant's counsel advised him to "contact his counsel" and that "[a]t this stage, any further arrangements regarding the file in this matter should be coordinated by [his] counsel." Upon learning of Appellant's counsel's email to Mr. Younger after Labor Day weekend – Appellant did not contact the Office of General Counsel directly, or copy the undersigned counsels on her email – the Secretary's counsel emailed Appellant's counsel, believing it to be in accordance with her wishes, requesting that she "[p]lease provide the date and time that [she] would like to review the claims file at the Philadelphia VA [RO]." That evening Appellant's counsel responded by email that she has "no desire to communicate directly with representatives at the RO," and that she also "will be unable and unwilling to consider an attempt to re-schedule any appointment at this time," until the Office of General Counsel "can explain to the Court what transpired after a confirmed appointment."

The error that occurred at the Philadelphia VA RO is certainly regrettable, and the Secretary sincerely apologizes to Appellant's counsel and to the Court for the delay and inconvenience it caused. Nevertheless, Appellant has failed to show that the Office of General Counsel has not acted reasonably, promptly and respectfully to accommodate her and facilitate her review. The Philadelphia RO

has been prepared since August 31, 2016, to furnish her with the opportunity for that review and at this point, is waiting for Appellant's counsel to provide a new date and time so that it can accommodate her.

WHEREFORE, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully responds to the Court's September 1, 2016, Order.

Respectfully submitted,

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